LIBRARY
SUPREME COURT, U. S.

No. 73-792

Supreme Court, U. S.
FILED
DEC 17 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS and G. E. STEPHENSON, General Chairman, Allegheny District Board of Adjustment of BRAC, and C. L. DENNIS, International President, Brotherhood of Railway, Airline and Steamship Clerks, and GEORGE A. SMITH, Secretary-Treasurer, Victory Lodge 2151,

Petitioners,

vs.

HENRY ROTA, Individually and for other members of Victory Lodge 2151 of the Brotherhood of Railway, Airline and Steamship Clerks, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SHAYLE P. FOX,
JEFFREY S. GOLDMAN,
LEDERER, FOX AND GROVE,
111 West Washington Street,
Chicago, Illinois 60602,
641-0200

MORRIS H. WOLFF,
STASSEN, KOSTOS AND MASON,
2300 Two Girard Plaza,
Philadelphia, Pennsylvania 19102,
LO 9-4530.

Attorneys for Respondents

Of Counsel:
HAROLD E. STASSEN,
STASSEN, KOSTOS AND MASON,
2300 Two Girard Plaza,
Philadelphia, Pennsylvania 19102,
LO 9-4530.

SORG/CHICAGO U.S.A.

TABLE OF CONTENTS

PAGE

Reasons for Denying the Writ

1. Review Is Inappropriate Because Of The Interlocutory Nature Of This Case Involving An Unresolved Material Issue Of Fact 2

2. The Court of Appeal's Decision is in Full Accord With The Applicable Decisions of This Court 4

3. The Evidentiary Rules Enunciated by the Court of Appeals Comport with Traditional Doctrine 6

Conclusion

This Factual Dispute Between The Parties Does Not Involve Any Important Legal Issues 9

INDEX TO CITATIONS

CASES:

A.L.B. Theatre Corp. v. Loews, Inc. (C.A. 7, 1966), 355 F.2d 495 8

American Federation of Musicians v. Wittstein, 379 U.S. 171 (1964) 4

Brotherhood of Locomotive Firemen and Engineers v. Bangor and Aroostok Railroad Company, 389 U.S. 327 (1961) 4

Calhoon v. Harvey, 379 U.S. 134 (1964) 6

Federal Power Commission v. Panhandle Eastern Pipe Line Co., 172 F.2d. 57, 60 (C.A. 3, 1949) aff'd. 337 U.S. 498 8

New York C. & H. R.R. Co. v. U.S. (C.A. 1908) 165 F. 833 7

PAGE

Schlemmer v. Buffalo, Rochester and Pittsburgh Railway Company, 205 U.S. 1 (1907) 7

S.E.C. v. Ralston Purina, 346 U.S. 119 (1953) 7

Switzerland Cheese Ass'n. v. Horne's Market, Inc. 385 U.S. 23 (1966) 4

Valdosta Livestock Co. v. Williams, 316 F.2d 188 (C.A. 4, 1963) 4

Waller v. Professional Insurance Company, 316 F.2d 729 (C.A. 5, 1963) 4

Wood v. Dennis (C.A. 7, 1973) —— F. 2d. ——, 84 LRRM 2662 9

STATUTES:

Labor-Management Reporting and Disclosure Act of 1959, (Landrum-Griffin Act, 29 U.S.C. 411) 3, 5, 6

Rule 23 of the Federal Rules of Civil Procedure 1

MISCELLANEOUS:

105 Cong. Rec. 6469-72 (1959) 9

105 Cong. Rec. at 6107, 6108 9

105 Cong. Rec. at 6228 9

105 Cong. Rec. at 6392 9

20 Am Jur 145, Evidence, Section 140 7

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-792

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS and G. E. STEPHENSON, General Chairman, Allegheny District Board of Adjustment of BRAC, and C. L. DENNIS, International President, Brotherhood of Railway, Airline and Steamship Clerks, and GEORGE A. SMITH, Secretary-Treasurer, Victory Lodge 2151, *Petitioners,*

VS.

HENRY ROTA, Individually and for other members of Victory Lodge 2151 of the Brotherhood of Railway, Airline and Steamship Clerks, et al., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, a class [1] consisting of members of Brotherhood of Railway Airline and Steamship Clerks, an international union which is one of the petitioners (herein referred to as "petitioner union"), oppose the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on October 1, 1973.

[1] The suit was brought as a class action under Rule 23 of the Federal Rules of Civil Procedure by Henry Rota, a member of petitioner union, on behalf of himself, other members of Victory Lodge 2151, a local union of which he is a member, and, on behalf of all other similarly affected members of petitioner union.

REASONS FOR DENYING THE WRIT

1. Review Is Inappropriate Because Of The Interlocutory Nature of this Case Involving An Unresolved Material Issue of Fact.

An issue of material fact has been raised by the pleadings and affidavits as to whether the vigorously disputed proposed dues increase resolution[2] was carried by the statutorily required majority vote.[3]

The amended Complaint, in referring to the activities at the 1971 convention of petitioner union relating to the contested dues increase, alleged:

> "(d) the membership of Victory Lodge 2151 was clearly opposed to such a drastic increase in dues, as was the majority of BRAC members who made up the class of plaintiff in this action. *A majority of the delegates also clearly opposed a dues increase of 100%.*"
>
> "(e) . . . Instead Chairman Dennis issued threats and intimidations from the chair in an effort to silence debate and dissent and then *"gavelled through" the matter without any effort to determine by written bal-*

[2] The subject of this dispute is the 100% increase of union dues, from $5.50 to $11.00 per month, "gavelled through" by the president of petitioner union at the 1971 convention after his rapid visual scan of a standing vote of 1235 delegates possessing varying weighted votes; the increase is being collected from each member of the respondents' class every month since July 1971.

[3] The statute which is the basis of this action is Section 101 of the Labor-Management Reporting and Disclosure Act of 1959, commonly entitled the Landrum-Griffin Act, 29 U.S.C. 411, referred to herein as the Act.

lot or roll call where each delegate stood on this closely contested issue, or to accurately determine the actual vote of the convention.'' (Emphasis supplied.) (Appendix to Petition for Writ, pp. 7a-8a.)

The allegations of the complaint were amply supported by several affidavits of delegates to the convention, who were eye witnesses to the conduct of the "vote".[4] Petitioner has offered no evidence of any accurate and reliable vote count.

---

[4] Following are sample excerpts from these sworn statements which dispute any majority vote in favor of the dues increase:

"Not nearly half of the room raised their hands in favor of the dues increase. He then asked for those who were opposed to raise their right hands and more than 2/3 of the delegates in the room raised their right hands." (Delegate Winchester, A. 107)

"I do not believe it was a simple majority." (Delegate Browne, A. 120)

"I remember that the opposing vote was taken and that we felt we had the edge." (Delegate Smith, A. 106)

"in favor . . . may not two-thirds at all, but actually less than fifty per cent." (Delegate Farley, A. 114)

"The delegates were equally divided and if anything those opposed held a slight majority." (Delegate Flaherty, A. 111)

"The same delegates who voted against it were the only ones who stood up when Chairman Dennis was challenged. And this in my opinion looked like 50% of the delegation." (Delegate Cooney, A. 108)

"About half the delegates stood for the raise and about half the delegates stood against the raise." (Delegate McCann, A. 122)

"It appeared to me to be only a 50-50 vote." (Delegate Brda, A. 115)

"I estimate that the vote was no more than 50-50." (Delegate Altman, A. 119)

"I contend that there was a 50-50 vote and not a 2/3 vote." (Delegate Marshall, A. 129)

References are to the Appendix filed with the Court of Appeals.

Because of this unresolved issue of material fact as to the number of votes favoring or opposing the dues increase, the Court of Appeals reversed the summary judgment order of the District Court and unanimously remanded for a trial stating:

> **"We believe there is sufficient confusion in the record on the question whether a majority voted in favor of the increase to preclude the entry of summary judgment . . . we merely decide that it was error to enter summary judgment. After the actual weighted vote has been determined it will be time to face whatever issues remain for decision." (Appendix to Petition for Writ, p. 2a)**

The net effect of the decision of the Court of Appeals is to deny the petitioners' motion to the District Court for summary judgment. The denial of a motion for summary judgment is a non-appealable, interlocutory ruling and not a final judgment in that the claim still remains pending for trial.[5] Clearly, therefore, in the language of this Court, the case "is not yet ripe for review by this Court."[6]

2. The Court of Appeal's Decision is in Full Accord With The Applicable Decisions of this Court

The Court of Appeals punctiliously adhered to this Court's decision in *American Federation of Musicians* v. *Wittstein,* 379 U.S. 171 (1964). The law enunciated in *Wittstein,* and urged by petitioners, was carefully observed by the Court of Appeal's decision, in its holding that:

---

[5] *Switzerland Cheese Ass'n.* v. *Horne's Market, Inc.,* 385 U.S. 23 (1966); *Valdosta Livestock Co.* v. *Williams,* 316 F.2d 188 (C.A. 4, 1963); *Waller* v. *Professional Insurance Company,* 316 F.2d 729 (C.A. 5, 1963).

[6] *Brotherhood of Locomotive Firemen and Engineers* v. *Bangor and Aroostok Railroad Company,* 389 U.S. 327 (1961).

> "The statute[7] does not undertake to specify the procedures that must be followed in voting on a dues increase". [8]

The Court of Appeals did not specify, as petitioners contend, that a roll call vote was required. If the Court had reached such a conclusion, the contested dues increase would have been summarily set aside by the Court, by means of *reversing* the District Court, since the petitioners have admitted the increase was imposed upon the union membership without any such formal count. Instead, however, the Court *remanded* the matter to the District Court to determine the actual count of votes that was not obtained at the convention. There is no conflict with *Wittstein* which states:

> "We hold that Section 101 (a) (3) (B) does not prohibit a weighted voting system under which delegates cast a number of votes equal to the membership or the local union for which they are elected . . . the section *requires a majority vote of the delegates voting*". (Emphasis supplied.)

In *Wittstein,* the precise number of weighted votes, and the number of delegates casting them, were duly recorded and part of the record before the Court. The facts in *Wittstein* are thus vastly different from those in the instant case in which no count of votes or delegates ever has been accomplished.[9]

---

[7] The statute referred to in *Wittstein* is the same Act which is the basis of the instant action.

[8] Appendix to Petition for Writ, p. 12a.

[9] Thus, consonant with *Wittstein,* the Court of Appeals has remanded the matter to the District Court for a determination of the conspicuously absent accurate count of votes.

Without explanation, petitioners erroneously allege that the decision of the Court of Appeals conflicts with *Calhoon* v. *Harvey*, 379 U.S. 134 (1964). But *Calhoon* was not a suit involving a contested dues increase; it was a suit by individual union members seeking to require a change in the union constitution and by-laws to provide new rules of qualification for nomination for union office. This Court decided that such disputes "basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title" in action brought by the Secretary of Labor; *Calhoon* is therefore wholly inapposite to the instant case in which the complaint arises out of an alleged Title I violation. This Court apparently already has distinguished the matters of dues increases from matters of qualification for union office by deciding the merits of the controversy in *Wittstein*, and dismissing the action in *Calhoon*.

3. The Evidentiary Rules Enunciated by the Court of Appeals Comport with Traditional Doctrine.

A majority vote favoring the dues increase must be proven to support such an increase because the Act has been drafted as a prohibition against increases in union dues, *except* by majority vote. The usual rules of statutory construction require that the legality of acting in a statutorily circumscribed area must be established by a showing that it was accomplished by means within a stated

exception.[10] The decision below applied the usual rule in holding that petitioners, to obtain the benefit of the statutory exception, would have the burden of proving a majority vote.[11] Such burden is particularly appropriate since the facts necessary to be proved are peculiarly within petitioners' knowledge:[12] petitioners alone have the names of the delegates, the votes each delegate possessed at the convention, and according to the allegations of petitioners, how

---

[10] See *Schlemmer* v. *Buffalo, Rochester and Pittsburgh Railway Company,* 205 U.S. 1, (1907) holding (at p. 10): "The general rule of law is that a provision carves special exceptions only out of the body of the Act; and those who set up any such exception must establish it . . . The rule applied to construction is applied equally to the burden of proof in a case like this."

[11] *S.E.C.* v. *Ralston Purina,* 346 U.S. 119 (1953), citing *Schlemmer,* note 10 *supra,* states: "Keeping in mind the broadly remedial purposes of Federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable."

[12] This proposition is called the Rule of Inconvenience and is stated in 20 *Am Jur* 145, Evidence, Section 140: "The broad rule prevails that the omission by a party to produce important testimony relating to a fact of which he has knowledge, and which is peculiarly within his control, raises the presumption that the testimony, if produced, would be unfavorable to his cause. In such case the burden of coming forward with proof is upon the party who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge or of which he is supposed to be cognizant," See also, *New York C. & H. R.R. Co.* v. U.S., (C.A. 1, 1908) 165 F. 833.

each delegate voted.[13] Further, it was petitioners who conducted the vote and who should be responsible for establishing the results thereof by a reliable and accurate count.

Respondents have established their right under the Act to be free from an arbitrary imposition of a dues increase and raised a genuine issue of the material fact as to the count of the votes on the question. The evidentiary rulings below, holding that petitioners, who conducted and controlled the proceedings which they allege to comply with a statutory exception, have the burden of establishing compliance with the statutory provision, are not in conflict with the decision of any Circuit and, indeed, are in harmony with those cases cited by petitioners.[14]

---

[13] Petitioners allege in its Petition (p. 13) that respondents "were not in a physical position to observe the vote and had no knowledge of the distribution of delegates on the convention floor."

[14] Not at all contrary to the holding below is the case cited by petitioners, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 172 F.2d 57, 60 (C.A. 3, 1949) aff'd 337 U.S. 498, in which the Court held that in a suit by an administrative agency, the agency must establish that it has been "given rights or powers for which sanctions are being sought" in a judicial proceeding. *A.L.B. Theatre Corp.* v. *Loews, Inc.* (C.A. 7, 1966), 355 F.2d. 495, also has been cited by petitioners; it stands for nothing beyond the general proposition that the party having an affirmative of an issue and failing to prove it will not prevail even absent countervailing evidence.

CONCLUSION

This Factual Dispute Between The Parties Does Not Involve Any Important Legal Issues.

The factual issue as to whether an appropriate number of votes supported a dues increase is momentarily important to the parties but not an important issue of federal law. The decision below merely restates the well established proposition that a vote has been required by statute as a safeguard against unscrupulously and tyranically imposed dues increases.[15] An order requiring the petitioners to overcome a deficiency in their procedures which omitted any accurate or reliable count of votes is not an unusual

---

[15] Providing protection against abuses by union leadership in increasing dues was the precise reason for the passage of the section of the Act involved in this proceeding. See the Statement of Senator McClellan during the debates prior to the passage of the Landrum-Griffin Act at 105 Cong. Rec. 6469-72 (1959); also the other remarks at 6107, 6108 (Sen. Goldwater), 6228 (Sen. Allott) and 6392 (Sen. Church). Similarly, in *Wood* v. *Dennis* (C.A. 7, 1973), ... F. 2d ....., 84 LRRM 2662, the Court of Appeals in upholding a cause of action under Section 101(a)(1) of the Act (29 U.S.C., Section 411(a)(1) against petitioner here, stated: "The Congress when it started its task of revising this country's labor laws was well aware of what representative Landrum referred to as . . . a significant lack of democratic processes in certain unions, that one-man dictatorships have thrived—in some instances for 20 to 30 years—and that through intimidation and fear, the rank and file union member has been deprived of a voice in his own union affairs 105 Cong. Rec. 14342 (1959)."

interpretation of the statute or a departure from any precedent.[16]

It is submitted that the interlocutory decision below, being in harmony with other decisions of this Court and the Circuits and not being ripe for review because it involves a yet unresolved factual dispute between the parties, is inappropriate for review.

Respectfully submitted,

SHAYLE P. FOX
MORRIS H. WOLFF
JEFFREY S. GOLDMAN,
Attorneys for Respondents

[16] Petitioner's irrelevant expression of doubt as to the reliability of any count of votes at this time and reference to petitioner's financial inability to be without the dues increase are subjective, personal pleas extraneous to the issue as to whether there has been a failure of statutory compliance by the petitioner in imposing a dues increase on unwilling members. These side issues open the door to counterstatements: as to the petitioners being solely responsible for delay in providing a count; the exorbitant officer salaries and pensions; high level nepotism and other abuses of the union treasury; and the allegations by the union, in opposition to motions for injunction, that it could readily rebate any judgment; all of these matters are impertinent at this stage of the proceedings to the question of the enforcement of the statute.